

# DECISION



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-218284

**DATE:** May 9, 1985

**MATTER OF:** Automated Datatron, Inc.

## DIGEST:

1. In the absence of convincing evidence of arbitrary or capricious action, GAO will not question a contracting officer's decision, with which the Small Business Administration representative concurs, to withdraw a small business set-aside.
2. A contracting officer may properly withdraw a small business set-aside prior to the closing date for receipt of offers where there is no longer a reasonable expectation that at least two small businesses will submit offers.

Automated Datatron, Inc. (Automated), protests the decision by the Department of the Army to withdraw the total small business set-aside restriction in solicitation No. DAKF49-85-R-0005 for computer output microfiche services at Fort Sam Houston, Texas, and to solicit such services on an unrestricted basis.

The protest is denied.

On January 29, 1985, solicitation DAKF49-85-R-0005 was issued by Fort Sam Houston, Texas, as a total small business set-aside for the acquisition of computer output microfiche services. Section "L5" of the solicitation, "Preproposal Conference," invited prospective offerors to a preproposal conference to be held on February 14, 1985, and advised offerors that at the conclusion of this conference, they would be provided with Army report information which they were to take to their facilities and from which they were to provide representative computer output microfiche which was to be returned to the contracting officer by February 20. The purpose of this "qualification exercise," in which interested firms would submit sample products derived from actual Army data, was to provide each interested offeror with the opportunity to demonstrate its particular capabilities.

Representatives of three potential offerors--Zytron, Data Media, Inc., and Southern Microfilm--attended the preproposal conference. Zytron was a large business and the procuring activity apparently had believed that both Data Media and Southern Microfilm were small businesses. However, at the conference, the representative of Southern Microfilm advised that it did not qualify as a small business since it did not meet the small business size standards set forth in the solicitation. On February 19, 1985, amendment No. 0001 to the solicitation was issued, which deleted the small business set-aside restriction and provided that the procurement would be unrestricted. This amendment also extended the deadline for receipt of offers from February 28 to April 1, 1985, and set forth a new time period for the required qualification exercise for the production of samples--March 13 to 22. The contracting officer states that amendment No. 0001 was mailed to all the firms on the bidders mailing list, including the protester, who had asked for a copy of the solicitation.

The contracting officer states that the decision to set aside the procurement had been based on a reasonable expectation that offers would be received from at least the two small businesses which had previously competed for similar procurements at Fort Sam Houston. The small business set-aside restriction was dissolved, she advises, after one of those potential small business offerors, Southern Microfilm, stated at the preproposal conference that it was not a small business. There were no other small businesses (apparently other than Data Media, Inc.) known to her who would submit offers under the solicitation since, as of February 14, four other small businesses had submitted "no bid" responses. In addition, the contracting officer notes that Automated did not attend the preproposal conference, had not indicated that it would submit an offer under the solicitation, and never requested to be sent a copy of the materials needed to perform the qualification exercise. The dissolution of the set-aside was brought to the attention of the Small Business Administration, which concurred in the agency's decision. We note that Automated submitted a "no bid" on the amended solicitation by letter dated March 18, 1985.

Automated asserts that the dissolution of the set-aside was arbitrary and capricious since there "has been no showing by the contracting officer that a

sufficient number of responsible or responsive proposals would not be received."

The decision as to whether there is a reasonable expectation that offers will be received from a sufficient number of small business concerns is basically a business decision within the broad discretion of the contracting officials so that our review is generally limited to ascertaining whether there has been an abuse of discretion. See Shayne Brothers, Inc., B-210534, Feb. 18, 1983, 83-1 C.P.D. ¶ 175. We will not question a determination by a contracting officer to withdraw a small business set-aside where the Small Business Administration representative has concurred in the withdrawal and in the absence of convincing evidence of arbitrary or capricious action. See Tufco Industries, Inc., B-189323, July 13, 1977, 77-2 C.P.D. ¶ 21.

Although the protester argues in general terms that the contracting officer's decision was arbitrary because it was factually unsupported, it has not shown to be inaccurate the contracting officer's account of the situation as of the close of the preproposal conference. In view of the information available to the contracting officer at that time, we cannot conclude that her determination to withdraw the set-aside was arbitrary or capricious.

Automated also suggests that the small business set-aside was withdrawn as a result of the agency's anticipation of receiving more favorable proposals with regard to price from large businesses. Automated cites decisions of our Office for the proposition that the fact that a lower price to the government may be expected from large business concerns is not a significant factor in determining whether a procurement should be set aside for small business and that under a set-aside, there is no authority for accepting bids submitted by large business concerns. There is nothing in the record before us to indicate that the small business set-aside was withdrawn as a result of the agency's anticipation of receiving a more favorable price from a large business. A protester has the burden of presenting sufficient evidence to establish its allegations. See Magnaflux Corporation, B-211914, Dec. 20, 1983, 84-1 C.P.D. ¶ 4. Since Automated has not presented any evidence to support its view that the set-aside was withdrawn in order to obtain a more favorable price, this basis for protest is denied.

Automated also cites decisions of our Office for the proposition that total small business set-asides should not be questioned unless they increase small business awards in a particular area beyond a "fair proportion" of the total work. The cases cited by Automated, 41 Comp. Gen. 649 (1952) and B-151419, June 25, 1963, concern challenges by large businesses to small business set-asides on the basis that the set-asides resulted in more than a fair proportion of procurements being awarded to small businesses. Those decisions in no way stand for the proposition that the propriety of small business set-asides may be challenged only on the grounds that the set-asides result in providing more than a fair proportion of procurements to small business.

Finally, citing 43 Comp. Gen. 497 (1963), Automated contends that bids from large business concerns submitted in response to a set-aside procurement may not be considered. Since there is no indication that the Army was considering for award proposals submitted by large business concerns prior to when the set-aside was withdrawn, this contention is without merit.

*for* *Harry R. Van Cleve*  
Harry R. Van Cleve  
General Counsel